No. 99-213

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC., *ET AL.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT STATE OF NEW YORK IN RESPONSE TO THE PETITION

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QUESTIONS PRESENTED

1. Whether a State or state agency is a "person" subject to suit under the False Claims Act, 31 U.S.C. § 3729 et seq.?

2. Whether the Eleventh Amendment bars a private citizen from commencing and prosecuting in federal court a False Claims Act lawsuit against a State?

3. Whether the federal courts should first decide the "person" issue under the False Claims Act in order to avoid deciding the serious Eleventh Amendment question?

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STATEMENT OF THE CASE

A. Introduction

The State of New York agrees with the United States as petitioner that the decision below of the United States Circuit Court of Appeals for District of Columbia Circuit, *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870 (D.C. Cir.), *op. supplemented*, 173 F.3d 890 (D.C. Cir. 1999), holding that New York is not a "person" subject to suit under the

federal False Claims Act, ("FCA"), 31 U.S.C. §§ 3729-3733, is in direct conflict with decisions by the Second Circuit in *United States ex rel. Stevens v. Vermont Agency of Natural Resources* (hereinafter "*Stevens*"), 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999), and the Eighth Circuit in *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870 (8th Cir. 1998). However, the State does not agree that the petition should be held pending this Court's decision in *Stevens*, No. 98-1828, and, indeed, urges that the case be heard together with *Stevens*.

B. Statement of Facts

New York licenses, regulates and supervises proprietary business schools under provisions set forth in New York law and regulations. *See* N.Y. Educ. Law, Art. 101, §§ 5001-5010 (McKinney 1995 & 1999 Supp.); N.Y. Admin. Code tit. 8, §§ 126.1-.17 (1995). These schools provide a curriculum of business-related courses which may also include English as a second language. N.Y. Educ. Law § 5001(1)(b) (McKinney 1995). The New York State Education Department ("NYSED") through its Bureau of Proprietary School Supervision ("BPSS") administers and enforces this statutory and regulatory scheme.

Students attending eligible proprietary schools are able to apply for grants and guaranteed loans under programs administered or supervised by the United States Department of Education ("USDOE") pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070-1099. These programs provide qualified students with funds to meet their educational costs for attending school. In order to participate in these programs, a school must certify to the USDOE its eligibility to receive federal money and its willingness to abide by federal program requirements. A school that is not in good standing with a State regulatory body faces loss of its federal funding.

Plaintiff Ronald E. Long is the former Coordinator of Investigations and Audit for BPSS. As Coordinator, Long was responsible for supervising BPSS' investigations of proprietary schools. Beginning in September 1989, Long directed an investigation of SCS Business & Technical Institute, Inc. ("SCS"), which operated five schools in New York City. Long alleges that the investigation revealed that SCS was engaged in fraudulent activities and that, as a result of the fraud, the school obtained federal student money for which it was not eligible. Long further claims that his supervisors at NYSED knew about the fraud but decided to conceal it to allow SCS to continue to receive federal funding.

Long was eventually discharged from his position at BPSS in early 1992. Long claims that he was terminated in retaliation for his vigorous pursuit of the SCS investigation. Despite his allegation that State officials assisted SCS, NYSED brought administrative charges in February 1992 against SCS and in March 1992 settled the charges. In the settlement, SCS admitted to wrongdoing in violation of state law, paid a fine of $1 million and agreed to have two BPSS employees monitor its future compliance with the state Education Law.

C. The Lower Court Proceedings

On September 11, 1992, Long, acting as a *qui tam* relator, commenced an FCA lawsuit under seal in the United States District Court for the District of Columbia. Two and one-half years later, on or about March 14, 1995, Long filed an amended complaint alleging that the State, Joseph P. Frey (who was Long's immediate supervisor at BPSS), SCS and SCS officials conspired to defraud the United States in violation of FCA § 3729(a)(3). The amended complaint also alleged that the State defendants retaliated against Long for pursuing false claims against the United States in violation of FCA § 3730(h).

In July 1995, after conducting an investigation, the United States intervened with respect to the SCS defendants and filed a separate First Amended Complaint. *See* 31 U.S.C. § 3730(b)(4)(A). On December 22, 1995, the United States notified the federal district court that, after an investigation of the State defendants, it declined to intervene against the State and Frey. *See* 31 U.S.C. § 3730(b)(4)(B).

Long's amended complaint was unsealed in February 1996. Long's counsel then notified the State that he would be seeking production of voluminous documents, including all documents concerning SCS, Long's employment with NYSED and BPSS' investigation of other proprietary schools. He also noticed the depositions of ten current or former NYSED employees.[1]

Four years after filing his original complaint and in response to a motion by the State defendants to change venue and to dismiss the amended complaint, Long cross-moved to amend his complaint. In the proposed second amended complaint, Long alleged that NYSED officials had continued to defraud the United States from the settlement of the administrative charges through January 1995, when SCS filed for bankruptcy and closed its New York schools. Long also now claimed that the State was liable under FCA §§ 3729(a)(1) and (a)(2) for "causing" SCS to file fraudulent claims. As relief, Long sought treble damages against the State for all of the money received by SCS from September 11, 1986 (which represents the six-year FCA

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[1] The State agreed to informal production of non-privileged documents with respect to SCS and plaintiff's employment, and thousands of documents have been produced. In November, 1996, the district court postponed formal discovery until it resolved the parties' pending motions to dismiss. After rejecting the State's motion in March 1998, the State moved for a protective order while it appealed the court's ruling and, on July 15, 1998, the district court granted the State's motion staying formal discovery pending the outcome of the State's appeal to the United States Court of Appeals for the District of Columbia Circuit.

statute of limitations in 31 U.S.C. 3731(b)(1)), civil penalties of up to $10,000 for each false claim or false record filed by SCS, back pay for his wrongful termination, together with attorney's fees.[2]

In October 1996, the district court denied the defendants' motion to change venue and allowed Long to serve and file his second amended complaint. The State defendants then moved to dismiss Long's second amended complaint and asserted, *inter alia*, that the State could not be sued as a "person" under the FCA and that this complaint was barred by the Eleventh Amendment.

In a decision dated March 26, 1998, the district court (Emmet G. Sullivan, U.S.D.J.) held, *inter alia*, that Long's lawsuit was not barred because the State is a "person" who can be sued under the FCA liability provision, and because the Eleventh Amendment does not bar an FCA lawsuit brought by a *qui tam* relator. App.[3] at 61a-103a, 999 F. Supp. 78 (D.D.C. 1998).

The State filed an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 1291 and the collateral order doctrine. In its brief, the State asserted, based upon the long-standing rule of judicial restraint, that the Court of Appeals should decide the "person"

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[2] Long has since stated that New York is only responsible for damages from October 1990 (presumably when the investigation revealed evidence of SCS' alleged fraud) until the schools closed. According to the United States' Second Amended Complaint (March 15, 1996), SCS received more than $100 million in federal education money from fiscal year 1988 through 1992 and filed numerous false statements, records and claims for payment with the federal government. In that complaint, the United States did not quantify the amount of FCA civil penalties or damages after fiscal year 1992 sought against the SCS defendants.

[3] "App." refers to the Appendix included in the petition.

issue before it decided the Eleventh Amendment question in order to avoid decision on a serious constitutional question.

In a unanimous opinion by Judge Silberman, the Court of Appeals reversed the district court and held that New York is not a "person" subject to suit under the FCA. In reaching this decision, it rejected the decisions of the Second and Eighth Circuits in *Stevens* and *Zissler*. The Court of Appeals also decided that, in light of its ruling on the statutory question which was dispositive of the appeal, it should not resolve the serious Eleventh Amendment issue. App. 1a-42a, 173 F.3d 870 (D.C. Cir. 1999). In a supplemental opinion, the court disagreed with the rationale espoused by the Fifth Circuit in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir.), *pet. for cert. pend'g*, No. 99-365 (Aug. 27, 1999), which had concluded that it was required to decide the Eleventh Amendment question first. *Id.* at 43a-60a, 173 F.3d 890 (D.C. Cir. 1999).

ARGUMENT

THE PETITION SHOULD BE GRANTED BASED ON THE QUESTIONS PRESENTED IN THIS BRIEF, AND THIS MATTER SHOULD BE HEARD TOGETHER WITH *STEVENS*

The questions presented in the *Stevens* appeal pending in this Court, No. 98-1828, and the first two questions presented in the State's response to the United States' petition herein (*see supra* at p. i) are identical. In addition, the third question presented in the State's response is closely related to the first two and involves a fundamental issue over which the Circuits are squarely in conflict.

Because the facts in this matter exemplify the punitive nature of the statute and the manner in which it interferes with state sovereignty, the petition should be granted based on the

questions presented in this brief, *see Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 & n.1 (1973), and the appeal should be heard together with *Stevens*. Granting the petition in this case should not cause a delay because the United States (which has not yet filed its respondent's brief in *Stevens*) is the only petitioner. Additional full briefing and participation by New York may assist the Court in resolving the important issues presented in these appeals.

I. The First Two Issues Presented Herein Are Identical to the Questions Presented in *Stevens* and the Facts Herein Exemplify the Punitive Nature of the Statute and the Manner in Which it Interferes with State Sovereignty.

A. This Appeal Illustrates The Punitive Financial Nature of the False Claims Act as Applied To States.

New York is being sued under the FCA for potentially hundreds of millions of dollars in damages, together with unspecified civil penalties (that could amount to millions of additional dollars) for allegedly failing to perform its regulatory and supervisory role properly. Because the FCA provides for treble damages, 31 U.S.C. § 3729(a), and many lower courts have interpreted the FCA to also permit civil penalties to be imposed for each false claim filed, New York's potential financial exposure is very substantial.

Significantly, New York faces large damages and penalties even though New York did not file any false claims with the United States. The only federal money that New York received in this case was obtained indirectly through tuition assessments paid by SCS to BPSS as State licensing fees. *See* 1990 N.Y. Laws ch. 887, § 4 (adding N.Y. Educ. L. § 5001(9) (McKinney 1995)). Under New York law, these assessments can be no greater than seven-tenths of one percent of the schools' gross

annual tuition. N.Y. Educ. L. § 5001(9) (McKinney 1995). Thus, the amount of federal dollars that New York allegedly received from SCS through its purported misconduct is only a small fraction of the millions of dollars in potential damages and civil penalties it is exposed to in this FCA lawsuit.

Moreover, Long, as a former coordinator for investigations for BPSS, is utilizing the *qui tam* provisions of the statute in order to reap a financial windfall even though it was his responsibility to detect wrongdoing by schools. New York's appeal will therefore supplement this Court's analysis in *Stevens* of the punitive nature of the FCA because it will illuminate in striking detail the extent to which the treble damages and civil penalty provisions of the Act can be used to penalize a State's taxpayers. *See also* Brief of *Amici Curiae* States of New York (and 43 Additional States) in Support of Petitioner in *Stevens* (Sept. 3, 1999) at pp. 3-4.

B. This Appeal Illuminates The Manner In Which The False Claims Act Interferes With State Sovereignty.

This appeal also illustrates the manner in which the FCA undermines the harmonious relationship between the federal and state governments. Tellingly, the United States declined to intervene against New York (but not against the SCS co-defendants) and thereby allowed the relator to prosecute the action against the State. Judge Silberman found this practice particularly disturbing because it "suggests that the government does not lightly take on the task of probing into the internal operations of the sovereign states, and may well think it better to leave such politically unpalatable tasks for the qui tam relators of the world." *Long*, 173 F.3d at 885.

Once the United States declined to proceed with the action, Long's counsel sought to proceed with discovery against the State, including the production of voluminous documents and noticing depositions. This appeal therefore illuminates the type of disruption that burdensome discovery and trial in an FCA

lawsuit could have on the State's administration of its own regulatory programs.

Furthermore, an FCA *qui tam* lawsuit can seriously threaten the relationship between the United States' administrative agency and the corollary State agency. In the vast majority of cases, the two agencies work together in order to serve the public interest and make the most efficient use of their combined but limited resources. Because a *qui tam* relator, such as Long, has only a financial interest in the FCA lawsuit and exercises substantial control over the litigation, he is much more likely to raise allegations and pursue the litigation in a manner that "drives a wedge between the two agencies, inhibiting a productive, collaborative partnership, generating suspicion and turning what should be a cooperative relationship into a strained and awkward one." *Stevens*, 162 F.3d at 229 (Weinstein, J., dissenting).

II. The Circuits Are Squarely In Conflict Over Whether The Court Should Decide The "Person" Issue Before It Decides The Eleventh Amendment Issue and This Appeal Presents This Separate And Fundamental Question.

The third question presented in New York's response to this petition is whether the federal courts must decide the statutory "person" question before they decide the serious Eleventh Amendment question. There is a direct conflict on this jurisprudentially important issue among the Courts of Appeals.

In *Foulds*, the Fifth Circuit stated that it must first decide the constitutional issue since the Eleventh Amendment operates as a "jurisdictional limitation." *Foulds*, 171 F.3d at 285. On the other hand, the D.C. Circuit below followed New York's assertion that it should first decide the issue of statutory construction under the well-settled doctrine of judicial restraint. App. at 34a. Judge Silberman then proceeded to write a thorough and well-reasoned opinion on the "person" issue.

In the D.C. Circuit's supplemental opinion, Judge Silberman provided three reasons for disagreeing with the Fifth Circuit's approach in *Foulds*. First, he explained that the court might be obliged to decide the statutory question first because New York had requested that it do so and that request might approach "a partial consent to suit on the statutory question." *Id.* at 47a. Second, Judge Silberman reasoned that the Eleventh Amendment does not operate as a strict limitation upon the court's jurisdiction and, therefore, the court was not required to decide the constitutional issue before it decided the statutory issue. Indeed, the D.C. Circuit noted this Court's most recent pronouncement that whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is an open question. *Id.* at 46a-47a (citing *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, ___, 118 S. Ct. 2047, 2054 (1998)). Third, Judge Silberman explained that the statutory question is "inextricably related" (App. at 53a) to the Eleventh Amendment issue, and that the determination of whether a cause of action exists "is also a kind of logical prerequisite to the jurisdictional inquiry." *Id.* at 50a.

Vermont properly urges this Court in its brief on the merits in *Stevens* to hold that a State is not a "person".[4] However, the issue whether the federal courts must address the statutory issue before deciding the serious constitutional issue is most directly and expressly raised in this appeal. Granting the petition based on the questions raised in the State's response will, therefore, provide this Court an opportunity to resolve this fundamental question which divided the Fifth and D.C. Circuits and to consider expressly the mode of analysis that should govern its decision in *Stevens*. It will allow this Court to decide whether an Eleventh Amendment defense, which "partakes of the nature of

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[4] The Second Circuit in *Stevens* decided both issues because its ruling was adverse to Vermont on each issue. The court's opinion, however, first resolved the Eleventh Amendment question and then decided the "person" issue. *See Stevens*, 162 F.3d at 203.

a jurisdictional bar," *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), must be resolved first or whether a dispositive and "logically antecedent" question of statutory construction should first be decided under the well-settled ruled of judicial restraint that federal courts must consider nonconstitutional grounds for decision. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). Additional briefing and participation by New York may also assist this Court in resolving the significant issues presented herein. *See* Brief of *Amici Curiae* States of New York (and 43 Additional States) in Support of Petitioner in *Stevens* at pp. 8-27.

CONCLUSION

The petition should be granted based on the questions presented in New York's response, and the matter should be heard together with *Stevens*, No. 98-1828.

Dated: Albany, New York
September 16, 1999

Respectfully submitted,

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